MILLION GROUP CREDIT SDN. BHD.

v.

LEE SHOO KHOON & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 758 OF 1984]
29 DECEMBER 1984

CONTRACT: *Draft sale and purchase agreement - Signed by applicant - Forwarded to respondents for signature - Together with 10% deposit of purchase price - Respondents not agreeable to certain terms - Declined to sign the agreement - Returned 10% deposit - Effect.*

LAND LAW: *Caveat lodged by applicant - Respondents issued notice to show cause why caveat should not be removed - In response applicant filed ex-parte application for extension of caveat - Effect.*

On 19 December 1983 the respondents through their solicitor made an offer to sell a particular piece of land on certain terms. On 21 December the applicant through their solicitor made a counter-offer to purchase the said property to the respondents' solicitor. The terms of the agreement were discussed by the solicitors and it was agreed that one clause should be deleted. The applicant's solicitor sent six copies of a draft agreement signed by the applicant and enclosed therewith was a cheque for 10% of the purchase price. The appellant's solicitors's covering letter dated 21 December 1983 stipulated that the 10% was not to be released unless the respondents had signed the sale agreement, signed the Memorandum of Transfer and deposited the Title Deed with the respondents' solicitor.

On 21 March 1984 the respondents' solicitor wrote to the applicant's solicitor stating that his clients were not agreeable to certain terms and conditions of the draft Sale Agreement and the applicant's cheque for 10% of the purchase price was returned. Consequently the applicant filed a caveat against the said property and the respondents filed notice to the applicant to show cause why the caveat should not be removed. In response to the notice the applicant has filed the present *ex-parte* application for the extension of a private caveat.

Held:

[1] A mere chose in action arising out of or incidental to a contract for sale of land does not entitle an applicant to lodge a caveat. There must be an interest in land.

[2] The sale agreement did not amount to a concluded contract as it was subject to contract.

[No extension granted on the caveat and should accordingly be removed. No order as to costs.]

Cases referred to:

Spottiswoods, Ballantyne & Co. Ltd. v. Doreen Applicances Ltd. [1942] 2 KB 32
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1978, r. 28

Other sources referred to:
Titles, Williams, 4 Edn. p. 20
Law of Real Property, Megarry, 3rd Edn. p. 552
Tenure and Land Dealings in the Malay States, David Wong pp. 415 - 417
Private Caveats, Wong Kim Fatt pp. 12 - 18

For the applicant - W.K. Teng; M/s. Lim & Teng
For the respondents - R.K. Menon; M/s. R.K. Menon & Co.

JUDGMENT

Mahadev Shankar J:

This is an *ex-parte* application for the extension of a private caveat which has been lodged by the applicant against the land of the respondents (the said land).

On 19 December 1983 the respondents through their solicitor made an offer to sell the said land on certain terms.

On 21 December 1983 the applicant through their solicitor made a counter-offer to purchase the said property on certain terms. This counter-offer was addressed to the respondents' solicitor.

The terms were the subject of a conversation in the course of which the solicitors agreed that one of the clauses in the written Sales Agreement should be deleted.

The applicant's solicitor then engrossed the draft agreement and forwarded six copies thereof to the respondents' solicitor with the request that the same be executed by the respondents. The agreement by then had been signed by the applicant and the covering letter enclosing the engrossed copies of the agreement was accompanied with a cheque for 10% of the purchase price.

The applicant's solicitor stipulated in his covering letter that this cheque was not to be released to the respondents unless they have signed the agreement of sale, signed the memorandum of transfer, and deposited the title deed with the respondents' solicitor. This covering letter is dated 21 December 1983.

Thereafter nothing happened until 21 March 1984. On that day the respondent's solicitor wrote to the applicant's solicitor stating that his clients were unable to agree on certain terms and conditions contained in the written agreement and consequently the applicant's cheque for 10% was returned to the applicant's solicitor uncashed.

The view taken by the applicant and their solicitor was that on the above facts they had a claim to the land and on some date not disclosed to the Court the applicant filed a caveat against the land. The grounds of their claim to the land were:

(a) On or about 21 December 1983 the Landowners agreed to sell and we agreed to purchase all the said land described in the schedule at the purchase price of RM1,359,000.

(b) Accordingly our solicitors, Messrs, Lim & Teng forwarded the Agreement of sale and our payment of RM135,900 being 10% of the purchase price to Messrs. R.K. Menon, Johore Bahru, Solicitors for the Landowners.

(c) The Landowners have now refused to sell the said land to us.

The photocopy of the caveat attached to the supporting affidavit is undated and the statutory declaration is also undated but I assume that the application filed in the Land Office had the dates entered thereon.

Thereafter on 30 October 1984 the respondents through their solicitor filed a notice addressed to the applicant to show cause why the caveat should not be removed.

It is in response to this notice that the applicant has filed the present application. Before I heard this application I drew the attention of the applicant's Counsel to the following authorities:

1. Williams *on Titles* - 4th Edn. p. 20

2. Megarry *on Law of Real Property* - 3rd Edn. p. 552.

After hearing the submission of applicant's Counsel on the law and the facts I dismissed this application.

I said that I would give my reasons later and I do so now. A mere chose in action arising out of or incidental to a contract for the sale of land cannot in my view entitle the claimant to lodge a caveat willy nilly to freeze land until his action has been heard.

He has to have something more. That something is "an interest in land". This expression has been the subject of considerable judicial discussion. See **"***Tenure and Land Dealings in the Malay States***"** by David Wong pp. 415 - 417 and **"***Private Caveats***"** by Wong Kim Fatt pp. 12 - 18.

So far as the facts of this case are concerned, it appears to me that there was never any concluded contract between the parties. Negotiations there were, but the only proper inference that I can draw in the circumstances of this case is that by submitting a formal agreement to the respondents' solicitors which the applicant's solicitor required to be executed this proposed sale was clearly subject to contract. The meaning of these words were spelt out by Lord Greene MR in *Spottiswoods, Ballantyne & Co. Ltd v. Doreen Applicances* Ltd. [1942] 2 KB 32:

> ... the language here is equivalent to the common and more concise phrase "subject to contract", and, if anything is settled, it is that that phrase is one which makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed in the usual way.

Merely because the respondents' solicitor agreed to a deletion of one clause in a draft does not in my view entitle the applicant's solicitor to say that by doing so he must be taken, on behalf of his clients, to have agreed to all the terms in the contract so that the execution of the document became a mere formality.

There is no evidence whatsoever before me that the respondents had an opportunity of considering all the terms in the final sale agreement before that document was put to each of them for execution.

Consequently it seems to me that this is not a case where the caveator has satisfied me on the evidence presented to this Court that he has a claim to an interest in the land, or that such a claim raised a serious question to be tried, let alone going on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action which the applicant filed on 29 November 1984. (See *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212).

In all the circumstances it is clear to me beyond a peradventure that this is not a proper case for the extension of the caveat and it should therefore be removed.

Before leaving this matter there are two other points which I think it pertinent to make. In these modern days of swift communication, *ex-parte* applications should be the exception rather than the rule. There was really no reason why the applicant here should not have given notice of his Originating Summons to the respondents' solicitor. If this had been done the Court would have had a benefit of the views of the respondents' solicitor, it being a matter in which they had a real interest.

A second point which needs to be emphasized is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence. The rules relating to conduct and etiquette in the profession quite clearly say that a solicitor should not appear as such in a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact. (See r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978).

Since this is an *ex-parte* application there will be no order as to costs.

Also found at [1985] 1 CLJ 181